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In The
Supreme Court of the United States
October Term, 1984

BELLEVUE FIRE FIGHTERS LOCAL 1604, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC, an unincorporated voluntary association; RON PEDEE, and WILLIAM P. SPIETH,

Petitioners,

vs.

CITY OF BELLEVUE, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Must a state court act on a party's request for attorney fees under 42 USC § 1988, where relief was granted solely under state law, and a lower court's denial of a Federal Constitutional claim was not reversed?

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STATEMENT OF THE CASE

In October, 1981, the Petitioners herein commenced an action in the Superior Court of the State of Washington naming the Respondent, the City of Bellevue, a defendant and challenging the validity of the City's ordinance prohibiting City employees from taking an active part in City Council election campaigns, alleging that the ordinance was in conflict with a state statute and violated sections of the state constitution as well as the First and Fourteenth Amendments of the U.S. Constitution. Petitioners sought injunctive relief and, in their First Amended Complaint, included a prayer for "reasonable attorneys fees and damages in an amount to be proved at trial." (First Amended Complaint p. 7; Petition, p. 42a.)

Petitioners include a Bellevue firefighter, the labor organization which represents the firefighters, and a Bellevue citizen who wished to receive political information from City employees.

The challenged Bellevue City Code section, BCC 3.90.050, read in part as follows:

> B. No city employee shall take an active part in the political management or political campaign of a candidate for a position on the Bellevue City Council.
>
> C. Nothing in this section shall prevent an employee from fully exercising those rights to participate in political activities granted by the provisions of RCW [Revised Code of Washington] 41.06.250.

This ordinance was interpreted in a memorandum from the City Manager to City employees, which is quoted in the Appendix to the Petition herein, at 14a-15a.

The statute referred to explicitly grants certain rights to public employees:

> Employees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit an employee of the state or any political subdivision thereof from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for nonpartisan offices. RCW 41.06.250(2)

Petitioners' request for a preliminary injunction was heard and granted by Judge Jim Bates of the Superior Court on October 15, 1981. On October 7, 1982, the case was submitted on affidavits to Judge David Soukup of that court. Judge Soukup ruled that, under the interpretation given the ordinance in the City Manager's memo, there was no conflict with the state statute or the constitutional provisions, and lifted the preliminary injunction. (See Petition, pp. 28a-29a.)

Petitioners appealed to the Supreme Court of the State of Washington. They again sought an interim injunction, which was denied; but on hearing the appeal the court reversed the decision below in a brief order stating that BCC 3.90.050 (B) was declared invalid. Petitioners filed a cost bill, and an affidavit requesting award of attorneys' fees in the sum of $87,328.15. Respondent filed a memorandum in opposition to the award of fees.

The State Supreme Court issued its full opinion on January 12, 1984, denying fees because the decision was

based solely on state law. *Bellevue Fire Fighters v. Bellevue,* 100 Wn2d 748, 756, 675 P2d 592 (1984). Petitioners' motion for reconsideration was denied, and they have sought a Writ of Certiorari in this Court.

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ARGUMENT

A. THE CIVIL RIGHTS ATTORNEYS FEE ACT DOES NOT AUTHORIZE AN AWARD OF FEES WHERE NO RELIEF WOULD BE GRANTED UNDER FEDERAL LAW.

Respondent does not deny that attorney's fees may be granted under 42 U.S.C. § 1988 on a claim under state law, where that claim arises from facts which would, or probably would, merit relief under appropriate federal law. It is Respondent's position, however, that not every complaint that alleges a constitutional violation gives rise to an award of attorney's fees; such a rule would ultimately require, rather than avoid, needless determination of issues from which courts currently abstain. If a mere untried allegation were to suffice, every claim brought to court would contain one for the sake of obtaining fees, and economics would make sure that all were litigated.

What is required instead is that the claim be "substantial". This avoids frivolous claims but allows a court to grant the relief authorized by the Civil Rights Act without necessarily reaching the merits of difficult constitutional issues. Petitioners in this action cite a number of cases where non-fee claims were joined with claims that were "substantial", or even were adjudged to be so; none of

these is authority for awarding fees in the case where the civil rights claim is invalid, and has been adjudged to be so.

1. The Federal Cases Involving Pendent Claims Cited by Petitioners Are Easily Distinguished.

A Federal District Court granting relief on a pendent state-law claim has already made a determination of "substantiality," for the latter is a prerequisite of jurisdiction. See for instance, *Kimbrough v. Arkansas Activities Association,* 574 F.2d 423 (8 Cir 1978). Petitioners cite this case on pp. 29-30 of their petition among "numerous decisions of federal courts of appeal in which, having never reached the substantial federal constitutional claims because relief was granted on state law claims. . . ." The District Court for the Eastern District of Arkansas had ruled that the challenged regulations of the defendant corporation did not actually prohibit the plaintiff from participating in interscholastic football, and therefore it did not reach his due process and equal protection claims. The District Court denied his claim for attorney's fees, but the Court of Appeals reversed the denial and remanded. The basis for the reversal is that the question of "substantiality" had already been answered:

> Without the existence of a substantial federal claim, no federal pendent jurisdiction over the non-federal claim exists. *Hagans v. Lavine,* 415 U.S. 528, 536-539, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *United Mine Workers v. Gibbs,* 383 U.S. 715, 722-725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Since the District Court in the instant case invoked jurisdiction and disposed of the case on non-federal grounds, it implicitly made the initial determination that the allegations of the com-

> plaint raised a substantial constitutional claim sufficient to confer jurisdiction. See *Hagans v. Lavine, supra,* 415 U.S. at 538, 94 S.Ct. 1372; *Edward Kuhn v. National Association of Letter Carriers,* 570 F.2d 757, 760 (8th Cir. 1978). We, therefore, conclude that the requirements for a discretionary award of attorney's fees as set forth by the House Judiciary Committee have been met.

Kimbrough, supra, 574 F.2d at 427. See also, *Seals v. Quarterly County Court,* 562 F.2d 390, 392 (6 Cir. 1977) (plaintiff's federal constitutional claims "previously described as 'substantial'" by court); *Williams v. Thomas,* 692 F.2d 1032 (5 Cir. 1982) (federal claim denied by jury, but under erroneous instruction).

Trial in a federal court of a case such as the one at bar will always imply that a court has determined that a substantial federal question is presented. A state court's decision not to award attorney's fees does not necessarily include such a ruling and is therefore not in conflict with those decisions.

2. The State Court Cases Cited Are Also Based On Substantial Constitutional Questions.

Petitioners have cited a number of state appellate court decisions in which attorney's fees have been awarded to a prevailing party despite the fact that a 1983 claim was not decided on its merits. Each of these, like the Federal decisions, contains a holding, explicit or implicit, that the Federal claim was a substantial one meriting fees.

In *Draper v. Town Clerk of Greenfield,* 384 Mass. 444, 425 N.E. 2d 333 (1981), the court awarded fees to a plaintiff who had challenged a state law under both State and Federal equal protection grounds. The trial judge had

decided the case on the basis of statutory interpretation, but the Supreme Judicial Court of Massachusetts, in awarding fees, focused on the substantiality of the constitutional claim:

> The single justice noted in his decision accompanying the preliminary injunction that the State defendants were "unable to articulate *any* intelligible purpose" served by their reading of the statute, which, given even minimal Fourteenth Amendment scrutiny, would seem to raise some constitutional problems; furthermore, he noted that the State defendants conceded the presence of "substantial constitutional questions."
>
> *Draper, supra* at 425 N.E. 2d 339.

Likewise, in *Davis v. Everett,* 443 So.2d 1232 (Ala. 1983), the trial court found that the defendants had violated the plaintiff's equal protection rights.

> It is not necessary here to equate equal protection under the Constitution of 1901, Art. I, §§ 1, 6, and 22, with equal protection under the United States Constitution for all purposes; however, the Alabama Constitution necessarily embraces at least the minimal requirements of the United States Constitution. Defendants violated plaintiff's equal protection rights under the Alabama Constitution. It may also follow that plaintiff's federal constitutional rights were violated; she alleged a substantial federal claim, which was not dismissed, and ultimately prevailed on her state constitutional claim. The *Gibbs* test was satisfied because both claims arose from a common nucleus of operative facts. Accordingly, Mrs. Davis was a prevailing party under § 1988.

Davis, supra, at p. 1236. *Davis* distinguishes another Alabama case, *Still v. Personnel Board of Jefferson County,* 406 So.2d 860 (Ala. 1981), where attorney's fees were denied because a lower court judge, though granting relief

on state law grounds, specifically denied the federal claim. See also *Right to Choose v. Byrne,* 91 N.J. 287, 450 A.2d 925 (1982); *Robinson v. City of Raytown,* 606 S.W. 2d 460 (Mo. App 1980); *Brown v. Hornbeck,* 458 A.2d 900 (Mo. App 1983).

3. Maher v. Gagne Provides No Criticism Of The Decision Below.

Both *Maher v. Gagne,* 448 U.S. 122 (1980), and the case it follows, *Maine v. Thiboutot,* 448 U.S. 1 (1980), hold that an award of attorney's fees is proper when a plaintiff prevails on a § 1983 claim, although a Federal Constitutional claim is not reached; further, as the Petitioners point out, the latter case so holds in the setting of an action brought in state court, like the case at bar. However, the reason for those holdings does not appear in this case.

In neither *Maher* nor *Thiboutot* were fees awarded for prevailing on a state claim pendent to a substantial constitutional claim. Instead, in each case the plaintiff had succeeded in showing a violation of a section of the Social Security Act, 42 U.S.C. § 602 (a)(7). The explicit holding of the two cases is that the Federal claim, under the Social Security Act, is one which can be brought under 42 U.S.C. § 1983, and one for which attorney's fees can be awarded under § 1988. These decisions have no relevance to a case where the plaintiffs do not prevail on their § 1983 claims.

B. PETITIONERS' CLAIM UNDER 42 USC § 1983 WAS PROPERLY DENIED.

The case at bar differs from those cited by the Petitioners where fees were awarded after a finding that a

"substantial" constitutional claim existed. As discussed above, that finding is either explicit (in the state court cases) or implicit (in those opinions where Federal jurisdiction was premised on the existence of a "substantial" question).

Instead, this case is like *Draper v. Town Clerk of Greenfield,* 384 Mass. 444, 425 N.E. 2d 333 (1981), discussed *supra,* p. 5, in that a lower court specifically denied Petitioner's Constitutional claim. The Supreme Court of the State of Washington declined to disturb this ruling on appeal, and thus the only existing judicial determination on the subject is that the § 1983 claim is invalid. Award of attorney's fees following such a determination is supported by no authority which has been cited.

Relief on the Petitioners' § 1983 claim would have to be denied under this Court's decisions in *United Public Workers v. Mitchell,* 330 U.S. 75 (1947), *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO,* 413 U.S. 548 (1973), and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), for those decisions deal with the same Constitutional challenges, but applied to the Hatch Act, 5 USC § 7324, which contains a similar prohibition against taking an active part in political management or political campaigns. The regulation imposed by the City of Bellevue applied to nonpartisan political campaigns, because elections for City Council are by definition nonpartisan; thus, they bore the same rational relationship to their goals of preventing unwanted influence as the rules against partisan campaigning upheld elsewhere. See *Wachsman v. City of Dallas,* 704 F.2d 160 (5th Cir 1983), *cert. denied,* 104 S.Ct. 537.

Wachsman considered a challenge by Dallas police and firemen to two sections of that city's charter which contained limitations similar to, and in some respects broader than, those in the Bellevue ordinance. The court declined the proffered distinction, that the Hatch Act cases deal only with partisan politics, seeing the references to partisan activity in *Letter Carriers* as a result of the focus of that opinion on the nature of Federal electoral politics.

> An across-the-board constitutional distinction for these purposes between "partisan" and "nonpartisan" elections to local legislative and executive type offices seems questionable on other grounds as well. We doubt that such human traits as personal ambition, greed, fear, and the like, on the one hand, and commitment to principle unselfishness, honor, and similar characteristics, on the other hand, are distributed among such candidates and their supporters in significantly different proportions according to whether the election by which they are chosen is "partisan" or "nonpartisan". *Wachsman, supra,* at pp. 167-168.

Without the partisan-nonpartisan distinction to rely upon, the plaintiffs in *Wachsman* saw the court uphold the City's ability to prohibit employees from making financial contributions to City Council candidates, from making public endorsements in certain situations, from circulating (though not signing) endorsement petitions, from soliciting contributions, and even from some participation in other elections. The Petitioners in this action likewise have no constitutional claim after the misleading partisan-nonpartisan distinction is disposed of.

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CONCLUSION

The Supreme Court of the State of Washington declared the City of Bellevue's ordinance on political activity by employees to be in conflict with a state law. In doing so, it left untouched a determination by the trial court that there was no violation of 42 USC § 1983. That determination is a correct one: if the Hatch Act is not unconstitutional, neither was the Bellevue ordinance.

Attorney's fees may be awarded under 42 USC § 1988 only where there is found to be a violation of § 1983, or a "substantial" claim. There is no authority that an invalid claim, such as that of the Petitioners', may be a "substantial" one. No conceivable public policy could be advanced by making an invalid claim a "substantial" one. The decision of the Washington Supreme Court regarding the award of attorney's fees is not in conflict with a decision of this court, or any state or federal court.

The petition for certiorari should be denied.

Respectfully submitted,

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